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No. 1129

In the Supreme Court of the United States

OCTOBER TERM, 1967

ATLANTIC INSURANCE COMPANY, et al.,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Motion to Dismiss or Affirm

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No. 1129

In the Supreme Court of the United States

OCTOBER TERM, 1967

ATLANTIC INSURANCE COMPANY, et al.,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Motion to Dismiss or Affirm

Appellee moves to dismiss the appeal or affirm the judgment on the ground that no substantial Federal question is presented by the appellant's jurisdictional statement.

This Court has held that state insurance retaliatory statutes such as the one here at issue, are included within the terms of the "McCarran Act"[1] (59 Stat. 33, 34, 15 U.S.C. Secs. 1011-1015) which declared existing state insurance regulatory and tax laws to be in the public interest. This Court accepted that declaration as determinative of the

1. Sometimes called the "McCarran-Ferguson Act."

validity of a state law taxing foreign insurers but not domestic ones, the base of the tax being the gross premiums on the business done by such foreign insurers in the taxing state. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408.[2] In that case this Court discussed the enactment of the McCarran Act, supra, and went on to say:

> "'Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that State taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes were not uncommon among the states, and the statute clearly included South Carolina's tax now in issue." 328 U.S. 408, 431

Following further discussion of Congressional power over interstate commerce, this Court concluded that

> "* * * the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented. *Nor is contravention of any other limitation.*" (328 U.S. 408, 436, emphasis supplied)

The opinion next deals with contentions that the tax violates the "due process" and "equal protection" clauses of

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2. Unofficial parallel citations to the United States Reports will be found in the Table of Cases preceding this motion.

the Constitution. The Court forcibly repudiates these arguments:

> "As for the due process contention, it was settled by a long line of authorities prior to the South-Eastern[3] decision, that the similar provision of the Fourteenth Amendment, as well as that requiring equal protection of the law, does not forbid the states to lay and collect such a tax as South Carolina's. Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth taken together accomplish such a restriction upon the co-ordinated exercise of power by the Congress and the states." (328 U.S. 437-438)

As stated above, this Prudential case dealt with the validity of a tax imposed upon companies foreign to the taxing state, measured by gross premiums received on business done in the taxing state by those companies but not imposed on that state's domestic companies.

In *Prudential Insurance Co. et al. v. Hobbs,* 328 U.S. 823, this Court affirmed the Kansas Supreme Court's judgments upholding the constitutionality of statutes which not only (a) imposed a premium tax similar to that which was the subject of *Prudential v. Benjamin, supra,*[4] but also (b) imposed license fees for appointments of insurance agents, (c) imposed a fireman's relief fund tax on foreign fire insurance companies, and (d) *exacted a retaliatory tax similar to the tax involved in this case. In re Insurance Tax Cases,* 160 Kan. 300, 161 Pac. 2d 726.

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3. *U.S. v. South-Eastern Underwriters,* 322 U.S. 533.

4. As in *Prudential v. Benjamin,* this tax was measured by premiums received on business done in the state and applied only to companies foreign to Kansas. 160 Kan. 300, 161 Pac. 2d 726, 731, 734.

This Court affirmed the judgments in that case without opinion, citing only *Prudential Insurance Co. v. Benjamin, supra,* and *Robertson v. California,* 328 U.S. 440. The latter case passes upon regulatory rather than simply tax matters (328 U.S. 440, 443). In view of this affirmance by this Court, of the state decision holding its retaliatory tax statute valid, on the authority of *Prudential v. Benjamin,* we submit that appellant's appeal presents no substantial Federal question.

The foregoing is what might well be called the "bare bones" of our contention. We proceed now with the factual and legal background—the meat.

I. Insurance Retaliatory Laws Are in Force in 47 States. Almost a Century of Usage Bears Witness to Their Reasonableness and Workability and the Courts, Including This Court, Have Continuously So Held for Almost a Century.

Insurance retaliatory laws, of the nature of the one involved in this action, began to be enacted in the immediate post-Civil-War period[5] and spread over the country. While it is said that 14 states repealed such laws immediately following the decision in *U.S. v. South-Eastern Underwriters,* 322 U.S. 533, (29 Notre Dame Lawyer 249), a count in 1966 developed the existence of such laws in 47[6] states.

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5. *Fire Assn. of Philadelphia,* 119 U.S. 110 cites an 1865 New York enactment of such a statute. *In re Insurance Tax cases,* 160 Kan. 300, 161 Pac. 2d 726 cites an initial Kansas enactment in 1871.

6. Ala. Code title 51, § 825 (1940)—held unconstitutional, see below; Ariz. Rev. Stat. Ann. § 20-230 (1956); Ark. Stat. Ann. § 66-2225 (Supp. 1961); Cal. Ins. Code § 685-685.4 (Supp.) (Cal. Rev. & Tax Code §§ 12281-12290 (Supp.) specifies procedure for the collection of the retaliatory tax); Colo. Rev. Stat. Ann. § 72-1-14 (Perm. Supp. 1960); Conn. Gen. Stat. Rev. §§ 12-211 (Supp. 1962), 38-22 (1958); Del. Code Ann. tit. 18, § 2709 (Supp. 1962); Fla. Stat. Ann. § 624.0228 (1960); Ga. Code Ann. § 56-321 (1960); Idaho Code Ann. § 41-1011 (1961); Ill. Ann. Stat. ch. 73, § 1056 (Smith-Hurd, Supp. 1963); Ind. Ann. Stat. § 39-5012 (1952); Iowa Code Ann. § 505.14 (Supp. 1962); Kan. Gen. Stat. Ann.

As at present in force in these states this legislation typically comprises a statute of State "A", providing that an insurance company of State "B" must pay, for the privilege of doing an insurance business in State A, the total of the taxes and governmental charges imposed by its "home" State B (state of incorporation) on a similar company of State A doing business in State B, if this total is higher than the "normal" tax of State B; in short and to slightly over-simplify: a company of State B cannot do business in State A for a lower amount of governmental charges than a company of State A would pay to do the same business in State B.

As pointed out by both California and Minnesota appellate opinions and many others[7] the statute is not motivated

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§ 40-253 (Supp. 1961); Ky. Rev. Stat. § 304.110 (1960); La. Rev. Stat. § 22:1079 (1959); Me. Rev. Stat. Ann. ch. 60, § 53 (Supp. 1963); Md. Ann. Code art. 48A, § 61 (Sup. 1963); Mass. Gen. Laws Ann. ch. 175, § 159 (1959); Mich. Stat. Ann. §§ 24.1430, 24.1476 (1957); Minn. Stat. Ann. § 71.23 (Supp. 1963); Mo. Ann. Stat. § 375.450 (Supp. 1963); Mont. Rev. Codes Ann. § 40-2826 (1947); Neb. Rev. Stat. §§ 44-149 to -153 (1960); Nev. Rev. Stat. 683.101 (1965); N.H. Rev. Stat. Ann. §§ 405:53-59 (1955); N.J. Rev. Stat. § 17:32-15 (1963); N.M. Stat. Ann. §§ 58-5-27, -49 (1953); N.Y. Ins. Laws § 61; N.C. Gen. Stat. § 58-192 (1960); N.D. Rev. Code § 26-01-05 (1960); Ohio Rev. Code Ann. § 3905.41 (Page 1954) (see also the reciprocal provision for retaliatory laws applicable to mutual insurance companies in § 3941.25); Okla. Stat. Ann. tit. 36, § 628 (1958); Ore. Rev. Stat. § 736.237 (1961); R.I. Gen. Laws Ann. § 27-2-17 (1956); S.C. Code § 37-132 (1962); S.D. Code § 31.1112 (Supp. 1960); Tenn. Code Ann. § 56-309 (Supp. 1963); Tex. Ins. Code Ann. art. 21.46 (1963); Utah Code Ann. § 31-14-9 (Supp. 1963); Vt. Stat. Ann. tit. 8, § 3367 (1958); Va. Code Ann. § 38.1-87 (1950); Wash. Rev. Code Ann. § 48.14.040 (1961); W. Va. Code Ann. § 3323 (1961); Wis. Stat. Ann. §§ 76.35-36 (1957); Wyo. Comp. Stat. Ann. 26-45 (1957).

7. *Bankers' Life Co. v. Richardson*, 192 Cal. 113, 124; *Republic Ins. Co. v. Comr. of Taxation* ..... Minn. ....., 138 N.W. 2d 776, 779-780.

See similar comments in cases cited in 91 A.L.R. 795-797.

There is a quirk in appellants' claim of discriminatory application of the law. As the Court of Appeal opinion points out, the

by any desire to discriminate but is simply a long sanctioned means of equalizing tax differentials between insurance companies of different states doing business in several states.

In no case has a State or Federal Appellate Court held such legislation unconstitutional, with the sole exception of Alabama.[8] But eight jurisdictions, including this Court, have squarely held such a statute to constitute a reasonable classification, or to be non-discriminatory, as against contentions of the nature made by appellant here.[9] Certainly these cases constitute part of that body of experience demonstrating the basis for the Congressional determination, as a fact, of the reasonableness of existing state tax and regulatory legislation in the insurance field; the *experience* to which

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Texas premium tax law so applied as to result in 91+% of insurers foreign to Texas paying premium tax on Texas business at the rate of 3.85%, while *all* Texas companies paid at the rate of 1.1%; less than a third of the rate paid by the 91% of the foreign companies (Typewritten opinion in the Record, pp. 6-7; Appendix A to Jurisdictional statement, pp. vi-viii) This, of course, is what triggered application of the California retaliatory tax in this case.

8. *State v. Firemen's Fund,* 223 Ala. 109, 134 So. 858, 77 A.L.R. 856; *Clark v. Mobile,* 67 Ala. 217.

9. Held reasonable classification or non-discriminatory: *Prudential Ins. Co. v. Hobbs,* 328 U.S. 822, see 160 Kan. 300, 161 Pac. 2d 726; *Commonwealth v. Firemen's Fund Ins. Co.,* 369 *Pa.* 560, 87 Atl. 2d 255, 258; *State ex rel Baldwin v. Ins. Co. of North Amer.,* 115 *Ind.* 257, 17 N.E. 574, 579; *State v. Ins. Co. of N.A.,* 71 *Neb.* 320, 341, 348, 355, 99 N.W. 36, 39-40, 100 N.W. 405, 102 N.W. 1022, 106 N.W. 767; *Pacific Mutual Ins. Co. v. Lowe,* 354 *Ill.* 398, 188 N.E. 436; *Phoenix Ins. Co. v. Welch,* 29 *Kan.* 480, 484 (also printed in vol. 32 of Pacific States Reports); *Clay v. Dixie Fire Ins. Co.,* 168 *Ky.* 315, 181 S.W. 1123, 1125.

Held condition of admission to state or of doing business therein: *Peo. v. Fire Assn. of Phila.,* 92 *N.Y.* 311, *affd.* 119 *U.S.* 110.

Held not delegation of legislative power but condition of legislation: *State ex rel. Texas Co. v. Dickinson,* 79 *N.J.L.* 292, 75 Atl. 803; *State ex rel. Baldwin, supra; Peo. v. Fire Assn., supra; Phoenix Ins. Co. v. Welch, supra; Home Ins. Co. v. Swigert,* 104 *Ill.* 653; *Goldsmith v. Home Ins. Co.,* 62 *Ga.* 379; *Haverhill Ins. Co. v. Prescott,* 42 *N.H.* 547; *Clay v. Dixie Fire Ins. Co., supra.*

this Court referred in *Prudential v. Benjamin*,[10] and again in *Robertson v. California*.[11] Certainly the appellant's jurisdictional statement sets forth no grounds, and, we submit, the record contains no evidence, which demonstrates any need for judicial reconsideration of the tax consequences of these now long standing doctrines of this and other courts. An examination of the cases cited as authority in the jurisdictional statement will show this; as we shall now demonstrate.

II. The Appellant's Jurisdictional Statement Shows That No Substantial Federal Question Is Posed by the Judgment Which Is the Subject of Its Appeal.

A. The authorities cited by appellants should be read in the light of the Judicial and Congressional history of taxation of the insurance business.

Appellants cite the following cases as supporting their claim that this litigation presents substantial Federal questions (Jurisdictional statement, pp. 6-8):

**Ozark Butane Co., Inc. v. Oklahoma Liquefied Petroleum Gas Board, et al.*, 379 U.S. 885, 380 U.S. 928*

Fire Association of Philadelphia v. New York, 119 U.S. 822 [affirming 160 Kan. 300, 161 Pac. 2d 726]

Lincoln National Life Insurance Co. v. Read, 325 U.S. 673

Prudential Ins. Co. v. Benjamin, 328 U.S. 408

Hanover Fire Ins. Co. v. Carr, 272 U.S. 494

Southern Ry. Co. v. Greene, 216 U.S. 400

Wheeling Steel Corp. v. Glander, 337 U.S. 562

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10. 328 U.S. 408, 432.

11. 328 U.S. 440, 447.

*Appellant's citation of *Ozark* on page 6 of its jurisdictional statement is not accurate.

Reserve Life Ins. Co. v. Bowers, 380 U.S. 258
State Board of Ins. v. Todd Shipyards, 370 U.S. 451
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77

Appellant asserts that the decision in the instant case is in conflict with *Hanover* and the cases following it on that list.

To the contrary, examination of facts and law set forth in these cases reveals no such conflict with the case at bar, as we shall show below.

In order to do so, however, we must direct this Court's attention to the fact—certainly well known to this Court—that the position of the insurance business under the Commerce Clauses of the Constitution has traditionally differed from that accorded to business of other financial organizations and to general industrial, manufacturing and mercantile operations. This difference arose first as a judicially created one, and subsequently by statute.

For in *Paul v. Virginia,* 8 Wall. 168, this Court held that issuing a policy of insurance is not a transaction of commerce and this opinion, with others that followed, was generally regarded as removing transaction of insurance from the operation of the Constitution's "commerce clauses" for many years, until *U.S. v. South-Eastern Underwriters* held otherwise (322 U.S. 533, 543).

Within a year of the *South-Eastern* case, Congress passed the McCarran Act, the nature of which has been set forth at the beginning of this Motion, and this was shortly followed by *Prudential v. Benjamin* and *Prudential v. Hobbs, supra,* in which this Court accepted the Congressional finding that the existing state regulatory and tax systems met the constitutional objections—with a *caveat* as to isolated provi-

sions which might raise constitutional questions other than related to the Commerce Clause (328 U.S. 408, 430).

Thus, except possibly[12] for the period of about nine months between the decision in *South Eastern Underwriters* and enactment of the McCarran Act, the insurance cases involving Federal questions have been litigated and decided on the basis that Commerce Clause restrictions on other businesses have slight, if any, application to interstate insurance transactions, whether this rule be based on the "non-commerce" concept or the *Prudential v. Benjamin* holding that, by the McCarran Act:

> "• • • Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in competition with local business. Such taxes were not uncommon among the states, and the statute clearly included South Carolina's tax now in issue" (328 U.S. 408, 431).

As the brief history of retaliatory statutes above[13] shows, the type of California statute imposing the retaliatory tax involved in this case has long been common among the states and is clearly included within the terms of the McCarran Act.

Against this background we now proceed to evaluate appellant's authorities listed above.

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12. But see *Robertson v. California*, 328 U.S. 440, 462, as to even this period. The *South-Eastern* case was decided by this Court, June 5, 1944. The McCarran Act was enacted March 9, 1945.

13. See beginning of this motion.

B. Appellant's authorities do not deal with activities covered by express congressional consent with judicial acceptance, as is the case with the tax here involved.

We have established above, we believe, that state insurance retaliatory statutes have long been common in this country, were obviously included as part of the state tax statutes declared to be in the public interest by the McCarran Act, and have been accepted by this Court as covered by that act.

Appellants cite no authority which is in any way contrary to these facts and several which support them. Taking appellant's authorities in the order cited (Jurisdictional Statement, pp. 6-9), this will quickly appear.

The first case cited, *Ozark Butane Co. v. Oklahoma Liquefied Petroleum Gas Board* (379 U.S. 885) is not an insurance case in any sense of the word. It deals only with the right of an Arkansas corporate liquefied gas storer and dispenser to conduct that business in Oklahoma in the face of an Oklahoma statute licensing the business and limiting the license, as to foreign corporations, to those whose home states permit an Oklahoma corporation to transact the same business in those states. Appellants allege that the case presents "many of the same issues as the case at bar" and that [therefore] "[T]his case indicates that this Court felt in 1964 that the issues in this case merited review." (Jurisdictional Statement p. 7)

As we have pointed out above, at this stage of the litigation where the question of the substantiality of the Federal question asserted by appellants is the primary issue, we submit that the existence of the McCarran Act and the decisions of this court following that Act, together with the history of insurance retaliatory legislation and litigation briefly reviewed above, eliminate any reasonable analogy with the butane gas business, which does not have such a history.

Possibly the fact that in *Ozark Butane* the three-judge District Court indiscriminately cited certain insurance cases as supporting certain of its holdings without discussing this history[14] may have contributed to the belief of appellants that an analogy existed, and the possible confusion which could have resulted from this phase of the District Court opinion may well have influenced this Court in noting probable jurisdiction. For such an analogy, however, is fallacious in view of the judicial and legislative history of insurance taxation which we set forth above.

Under *Prudential v. Benjamin* and *Prudential v. Habbs*, a Federal question, if there be one, respecting the validity of state retaliatory statutes regulating the butane gas business has no analogical force in respect to a similar statute concerning the insurance business.

The remaining cases cited by appellants fall under these classifications:

(1) Those prior to *Southeastern*, in which this Court distinguished transaction of insurance from other businesses under the Commerce Clauses (*Fire Association, Lincoln National Life,*) the doctrines of which were broadened by the McCarran Act and the two *Prudential* cases.

(2) Cases dealing with taxes which, unlike the tax in the litigation at bar, were not the taxes on the transaction of insurance business of the sort common in the *pre-McCarran* period, but were efforts to impose a new and different kind of tax. The new tax so imposed, had no impact on the insurance business different than in the case of other types of corporate business, and consequently was held subject to the same tests, respecting the burden thereby cast upon interstate commerce and discrimination under the Fourteenth Amendment, as in the case of mercantile, manufac-

14. See 235 Fed. Supp. 406, 410.

turing and similar businesses (*Hanover, Southern Railway, Wheeling Steel,* and *Reserve Life*).

(3) Cases in which there were insufficient taxable transactions in the forum state to constitute a basis for *any* tax by that state, whether upon transactions of insurance or other business. (*Todd Shipyards, Connecticut General.*)

Appellants, in their discussion (jurisdictional statement, pages 7 and 8) of the cases and the rules it derives from them, simply read the cases as if the peculiar legal history of insurance taxation never existed; as if *Prudential v. Hobbs* and *Prudential v. Benjamin* represented no change in application of the commerce clauses from *Fire Association v. New York* and *Lincoln National Life v. Read;* and as if *Hanover Fire Insurance Co. v. Carr (Harding), Southern Ry. Co. v. Greene, Wheeling Steel Corp. v. Glander,* and *Reserve Life Ins. Co. v. Bowers,* dealt with Congressionally sanctioned and commonly enacted insurance tax legislation.

Because of these implicit assumptions in appellant's statement any attempt to discuss the mentioned cases in terms of appellant's theory presents a task not unlike the proverbial attempt to unscramble an egg.

We therefore limit our discussion to a case by case analysis which, we think, will demonstrate the fallacy of these assumptions of appellant by setting forth the present state of the law as so developed.

One of the earliest of the pre-*McCarran* cases, *Fire Association of Philadelphia v. New York* (1886) 119 U.S. 110, sustained exactly the type of statute later specified in the McCarran Act, against "equal protection" objections by resting on the orthodox "condition of admission" theory: that the license expired annually, that payment of the tax was a condition of the annual renewal, that a corporation of another state had no "citizenship" status in a foreign state

except as granted by the law of the foreign state; that any condition desired could be imposed as a condition of such admission to transact business because of this lack of status; that the entry was therefore for only a year at a time and the corporation lost any status in the state unless it renewed its license. Therefore, since a corporation, unlike a natural person, had no right to do business in the state except as licensed, payment of a license fee which included the protested tax was a proper condition to renewal. In this connection *Paul v. Virginia,* 8 Wall. 868 and the other "non-commerce" cases were also cited. (119 U.S. 110, 117-118)

This reasoning was, as appellant states, again used to sustain unconstitutionality of a tax measure by the gross premiums on business done in the state by a foregin insurance company in *Lincoln National Life Ins. Co. v. Read,* 325 U.S. 673, about a year before *Prudential v. Benjamin,* 325 U.S. 408.

In that *Lincoln* case, however, this Court was careful to point out that, "It is not contended that appellant is engaged in interstate commerce. Hence we do not have presented any question concerning the effect of *United States v. South-Eastern Underwriters Ass'n.,* 322 U.S. 533, 64 S. Ct. 1162, 88 L.Ed. 1440, on the problem." (325 U.S. 673, 678, ftn. 4)

In *Prudential v. Benjamin,* however, this Court went beyond any such limited base for support of the validity of existing state insurance taxation and regulation. *Lincoln* and *Philidelphia Fire Association* are merely mentioned, along with *Hanover Fire Association,* in a footnote as supporting the Court's holding that the due process and equal protection clauses did not forbid a state tax on gross premiums received from business in the state by a foreign insurance company.[15]

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15. 328 U.S. 408, 438 (ftn. 50).

This Court did not therein discuss the basis for the holdings and, as above pointed out[16] based its sustaining of the tax on its acceptance of the Congressional finding in the McCarran Act, which it interpreted as not requiring uniformity of state insurance taxes as between insurers foreign and those domestic to the State.

It is in the discussion of the two *Prudential* cases that appellants make the first implicit assumption to which we refer. Appellant states that in *Prudential v. Hobbs* and *Prudential v. Benjamin*, the tax law had been in effect prior to the date the companies had been admitted to the respective states and "was being applied to foreign seeking admission *after* that date." (Jurisdictional Statement p. 7)

This is correct as a statement of fact, but is erroneous insofar as it implies that the *Prudential* cases are limited in their effect to the grounds and reasoning of *Fire Association* and *Lincoln National Life*. As we have demonstrated above, the *Prudential* cases stand on no such narrow ground, but on the basis that the McCarran Act was within the Congressional power and covered these taxes.

Incidentally, appellant's fallacy in attempting to restrict the holding of the *Prudential* cases to the quasi-waiver or estoppel grounds and holdings of *Fire Association* and *Lincoln National Life*, is illustrated by its citation of *Hanover Fire Insurance Co. v. Harding (Carr)* as illustrating its thesis that after a company has been unconditionally admitted to a state, it cannot be taxed at higher rate nor made subject to additional burdens not imposed on domestic insurer (Jurisdictional Statement pages 7-8), while the same case was cited by this Court in *Prudential v. Benjamin* as supporting the Court's statement that a long line of authorities settle that neither the due process nor the Equal

16. See opening paragraphs of this Motion.

Protection clauses forbade South Carolina's franchise tax on foreign insurance companies measured by premiums on business done in that state, a tax which clearly falls within the brackets which appellants contend *Hanover* forbade.

The answer is that the *Hanover, Southern Railway, Wheeling Steel Corporation* and *Reserve Life Insurance Company* cases do not deal with taxes on the insurance business as such, but with *ad valorem* taxes on property[17] which in some of these cases was, and in others was not, owned by an insurance company. As the following discussion will show, this Court has refused consistently to apply the doctrine of *Paul v. Virginia* and *Prudential v. Benjamin*, respecting the power of the state to regulate and tax the transaction of insurance by foreign insurers on a different basis than domestic insurers, to ad valorem taxes on property owned by a foreign corporation, whether or not it be an insurer. This has been a perfectly logical and sound distinction since the tax is in such case not a tax on the privilege of transacting the insurance business, but a tax on the privilege of owning property. In such case there is no basis for distinguishing between property owners, whether by citizenship or by occupation.

For in *Hanover Insurance Co. v. Harding (Carr)*, the franchise tax of 2% of the premiums written on business done in the state, exacted from foreign insurance companies only, was unchallenged. (272 U.S. 494, 504). The "net receipts" tax which was the subject of the *Hanover* litigation had long been accepted as a property tax applicable to

17. It was obviously in contemplation of this doctrine that the statute under attack in this case excluded *ad valorem* property taxes from retaliatory consideration: "This article shall not apply • • • as to ad valorem taxes on real or personal property • • • " (Calif. Insurance Code, sec. 685.1, as enacted by Calif. Stats. 1959, Ch. 2120).

assets which in the case of a domestic company would have remained in the state subject to taxation as personal property (272 U.S. 494, 504, 506-507, 516). It was payable to the local governments at the rate of the local property tax. (272 U.S. 494, 501). The feature on the basis of which this Court held the *Hanover* tax invalid was, as the opinion points out, the judicial change in that property tax, which prejudicially deprived foreign companies of the same base for that tax as in the case of domestic companies (272 U.S. 494, 516). This Court held that the discrimination resulting could not be cured by the Illinois Court's label of "occupation" tax.

Likewise, the next case cited, *Southern Railway Company v. Greene,* 216 U.S. 400, deals with the same character of tax, in addition to the fact that no insurance question as such is involved. The tax was "upon the actual amount of the capital employed by • • • [every foreign corporation] • • • in the State; in the amount of $25 of the first $100, 5% on the next $900, and one-tenth of 1% on all the remaining amount of capital so employed." (216 U.S. 400, 401)

The case therefore deals with an *ad valorem* property tax since it was determined by percentages of the value of the stock allocated to business in the taxing state. The case has further been distinguished by this Court from the general rule as to corporate tax classification because of the large and one-purpose nature of investment in railway operating property. *Baltic Mining Co. v. Mass.* 231 U.S. 68, 87-88; *Cheney Bros. v. Mass.* 246 U.S. 147, 156-157; *Northwestern Mutual Life Ins. Co. v. Wis.* 247 U.S. 132, 140.

This distinction between *ad valorem* taxes on property owned by the taxpayer and excise taxes for the privilege of transacting a particular business has been expressly recognized by this Court in the next two cases cited by appellants,

Wheeling Steel Corp. v. Glander, 337 U.S. 562, and *Reserve Life Ins. Co. v. Bowers,* 380 U.S. 258.

In *Wheeling,* the State of Ohio apparently attempted to change the general rule governing the *situs* for taxation of intangible property—accounts receivable in particular. By its statute, intangible property arising out of business transacted in Ohio by a nonresident was subject to taxation, whereas property of a resident arising out of business transacted outside the state was not subject to taxation. This Court commented:

> "Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The State may arbitrarily exclude them or may license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. *Hanover Insurance Co. v. Harding,* 272 U.S. 494, 507; *Connecticut General Co. v. Johnson,* 303 U.S. 77, 79-80. Ohio elected, however, to admit these corporations to transact businesses and operate manufacturing plants in the State. For that privilege they have paid all that the State required by way of franchise or privilege tax, which includes in its measure the value of all property owned and business done in Ohio. §§ 5495, 5497, 5498 and 5499 of the Ohio General Code. See *International Harvester Co. v. Evatt,* 329 U.S. 416. After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, *at least to the extent that their property is entitled to an equally favorable ad valorem tax basis. Hanover Insurance Co. v. Harding,*[18] 272 U.S. 494, 510-511; *Power Co. v. Saunders,* 274 U.S. 490, 493, 497. Ohio holds this tax on intangibles to be an *ad valorem* property tax. *Ben-*

18. Note that *Hanover* is here cited as relating to an *ad valorem* tax.

nett v. Evatt, 145 Ohio St. 587, 62 N.E. 2d 345, and in no sense a franchise, privilege, occupation or income tax." (337 U.S. 562, 571, emphasis supplied)

The Court went on to specify the discriminatory effect of the tax:

> "The certificate of the Tax Commissioner discloses how fundamentally discriminatory is the application of this *ad valorem* tax to intangibles when owned by a resident or domestic corporation as contrasted with its application when those are owned by a domesticated corporation or a nonresident. If on the taxing date one of these petitioners and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State appellant's account receivable would be subject to Ohio's *ad valorem* tax and the one held by the competing domestic corporation would not. It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner." (337 U.S. 562, 572)

And the Court accordingly held the tax to be invalid. *Reserve Life Insurance Co. v. Bowers, supra,* is a memorandum decision reading as follows: "Per Curriam. The judgment is reversed and the case is remanded to the Court of Appeals, First Appellate District, Ohio. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562" (380 U.S. 258)

Examination of the decision thus reversed, in ..... Ohio App. ....., 196 N.E. 2d 114, develops again that the complaint of discrimination has to do with the personal

property tax. By Ohio law foreign corporations (including foreign insurers) were subject to tax on their personal property held in Ohio, a tax from which domestic Ohio insurance companies were exempt. Domestic insurance companies were subject to the lower of two taxes, a tax on the capital and surplus or a tax on the gross premiums on Ohio business. The foreign insurance companies,—although the case is unclear on this point—also were taxed on their gross premiums at a higher rate than domestic companies. The Ohio Court held that,

> "Under all the circumstances apparent in the record here, it cannot be considered that the composition of an ad valorem tax on the tangible personal property of a foreign insurance company and otherwise taxing domestic insurance companies by the lesser of two formulae is an improper or unlawful classification of taxpayers or discriminatory either for or against the foreign company." (..... Ohio. App. ....., 196 N.E. 2d 114, 118)

The reversal, then, of this decision by the Supreme Court on the authority of *Wheeling Steel* was both logical and sound. The only difference of fact was that the *Wheeling* tax dealt with *intangible* personal property and this case with *tangible* personal property.

But *Wheeling Steel's* careful distinction of the offending tax from a "franchise, occupation, or income tax" and its comment on the right of equality in *ad valorem taxes* (see quotation from *Wheeling Steel, supra*) and the attempt by the Ohio court in *Reserve Life* to lump the personal property taxes and the franchise taxes in an effort to deny discrimination; which was repudiated by the reversal by the higher court, completely distinguish these cases from those dealing with insurance premium and retaliatory taxes which are strictly excise taxes on transaction of insurance business.

The remaining cases cited by appellants as demonstrating constitutional weakness of the retaliatory law also do not deal with the retaliatory law at all, but with the basic jurisdictional test of the power to impose any franchise tax. These are *Connecticut General Life Insurance Company v. Johnson,* 303 U.S. 77, and *State Board of Insurance v. Todd Shipyards Corporation,* 370 U.S. 451. The point determined by these two cases is a constitutional one, but has nothing to do with retaliatory taxes, but with the very jurisdiction to tax at all.

In the *Connecticut General* case it was held that California's attempt to tax re-insurance premiums as to which the only California contact was the fact that California residents were indirectly involved was a violation of the Fourteenth Amendment. The reinsurance contracts were between Connecticut General and other insurance companies. They provided that Connecticut General would reimburse the other companies for certain losses in connection with other companies' California business. Under each reinsurance contract the second company was the insured, and Connecticut General was the insurer. No California resident had any rights under the reinsurance contract. No act concerned with the reinsurance contract took place in California nor did the contract itself provide for any act to be performed in California. This Court reversed the California Supreme Court decision by holding that there were insufficient California contacts to entitle California to tax the business:

> "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a

foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere." (303 U.S. 77, 80-81)

In *State Board of Insurance v. Todd Shipyards,* 370 U.S. 451, a corporation foreign to Texas owned shipyards in that state. It placed insurance thereon in insurers not licensed in Texas. This court summarized the facts as follows:

"The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

"The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas." (370 U.S. 451, 454-455).

This Court held that Texas law purporting to impose a tax on premiums paid for insurance to an insurer not licensed in Texas unless placed through a Texas agent, was invalid.

In both *Connecticut General* and *Todd Shipyards,* the Court cited and followed a line of cases which has long held that where the insurance transactions had no con-

tact with a state except that the insured risk was located therein, that state could not tax the insurance transaction. In *Todd Shipyards* the Court expressly relied upon Congressional reports during debate that indicated that the McCarran Act's reference to state taxation of insurance included the restrictions on state power imposed by *Connecticut General* and other cases cited therein.

But both cases, and their cited predecessors, dealt with taxation by a state of insurance transactions outside the state. Both the retaliatory tax and the normal gross premiums tax, however are franchise taxes laid on business done *in* the taxing state.

Finally we note that this Court has given the best answer to the last paragraph of appellant's jurisdictional statement:

> "A state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits; and second, that 'a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.'" *Northwestern Mutual Life Ins. Co. v. Wisconsin,* 247 U.S. 132, 140.

As we have shown, this court has already clearly answered the Federal questions which appellants assert are substantial. Nor have appellants set forth any new facts or problems which give any occasion for reconsidering those answers. State taxing systems have for over twenty years operated on the basis of those answers. The appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

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